Subsistence Management Chronology

1925 – 2002

1925: Alaska Game Law. Believed to provide for most subsistence hunting during territorial days, the law stated that "...any Indian or Eskimo, prospector, or traveler [can] take animals, birds, or game fishes during the closed season when he is in the need of food."

1960: Statehood. The federal government transferred authority for management of fish and game in Alaska to the new state government. Both the federal and the state government recognized subsistence fisheries.

1971: ANCSA. The Alaska Native Claims Settlement Act (ANCSA) extinguished aboriginal hunting and fishing rights. No law was enacted that protected subsistence, but the conference report stated Native subsistence and subsistence lands would be protected by the State of Alaska and the Department of Interior.

1974: Board of Game Authority. The Board of Game gains statutory authority to set up subsistence hunting areas, control transportation within hunting areas, and open or close seasons to protect subsistence hunting. This law was never used to set up a subsistence hunting area, although other methods and means were used to address perceived subsistence needs.

1975: Caribou Crash. With the crash of the Western Arctic Caribou Herd, ADF&G and the Board of Game attempted to set up a system that would give hunting permits to residents most dependent on caribou. Three criteria were developed for this purpose: customary and direct dependence, local residency, and availability of alternate resources. This approach was challenged by a Fairbanks sportsman's group on the grounds the board could not allocate to individuals. The courts decided the case in favor of the plaintiffs. This led others to consider ways to include subsistence protections in federal legislation, which eventually became ANILCA.

1978: State's First Subsistence Law. Following indications of imminent federal action in ANILCA, the state passed its first comprehensive subsistence law which required, once sustained yield has been ensured, that reasonable subsistence uses be allowed, with a priority if necessary (Ch. 151 SLA 1978). The law defined subsistence as "customary and traditional uses" of fish and game for specific purposes such as food.

1980: ANILCA Passed. Congress passed the Alaska National Interest Lands Conservation Act, creating 104 million acres of new national parks, preserves, and wildlife refuges (P.L. 96-487, December 2, 1980 [94 Stat. 2371]). Title VIII of that act mandates that the state maintain a subsistence hunting and fishing preference for rural residents, or forfeit management of these subsistence uses on public lands. If the state fails to protect subsistence as described in ANILCA, the act stipulates the federal government will take over management of fish and wildlife on the two-thirds of the state that is federal land.

1982: State Law's Consistency With ANILCA is Established. The joint Boards of Fisheries and Game adopt a regulation specifying that customary and traditional uses are rural uses (5 AAC 99.010), and the Department of Interior certifies the state's consistency with ANILCA.

1982: Repeal Initiative. A statewide ballot initiative to repeal the state subsistence law fails at the polls (59% of Alaskans voted against repeal).

1983: Subsistence Suit. Several Alaskans file suit against the state subsistence law. In McDowell v. State, plaintiffs argue the law is unconstitutional because it denies subsistence privileges to some urban residents who have long depended on fish and wildlife resources, while granting those privileges to some rural residents who do not need it.

1985: Madison Decision. The Alaska Supreme Court, in the Madison decision, rules that state regulations limiting subsistence to rural residents (enacted by the Joint Boards in 1982) are not consistent with the state's 1978 subsistence law. The Interior Department notifies the state the Madison decision violates the provisions of ANILCA and threatens takeover of fish and wildlife on public lands unless the state comes up with a new subsistence law, incorporating the rural limitation.

1986: New State Subsistence Law. The Alaska legislature enacts a new law limiting subsistence to rural residents (Ch. 52 SLA 1986; AS 16.05.90). Rural is defined as an area where the "...noncommercial, customary and traditional use of fish or game for personal or family consumption is a principal characteristic of the economy..." In state superior court, the McDowell suit is amended to challenge the new subsistence law. The Kenaitze Indian tribe also files a suit in federal court under ANILCA to protest the classification by the Boards of the Kenai Peninsula as an urban area (Kenaitze Indian Tribe vs. State of Alaska, No. A86-367).

1987: Kenaitzes Initially Denied. A federal court judge rules against the Kenaitze Tribe, saying the state's subsistence law's definition of rural agrees with use of the word "rural" in federal subsistence law.

1987: McDowell Initially Denied. The state superior court holds that the 1986 subsistence law is constitutional.

1988: Kenaitze Decision Reversed. The Ninth U.S. Circuit Court of Appeals in San Francisco reverses the Kenaitze decision and holds that the state definition of rural is not consistent with ANILCA (Kenaitze Indian Tribe vs. State of Alaska, 860 F. 2nd 312, [9th Cir. 1988]). The court suggests that a definition of rural hinges on demographic characteristics. The U.S. Supreme court ultimately denies review.

1989: Kenaitze Negotiations. Under direction of the federal district court in a preliminary injunction, the state and the Kenaitze tribe agree to a one-year educational fishery, for plaintiffs in that case only, until a permanent subsistence solution can be found. The state initially believes that a simple amendment to ANILCA, which changes the federal definition of rural to match the state definition, is the best solution. However, that effort failed, and negotiations begin toward reaching a consensus position.

1989: McDowell Decision. On December 22, 1989, ruling in McDowell v. State, the Alaska Supreme Court found that the 1986 state subsistence law was unconstitutional because it excluded urban residents from subsistence activities. On January 5, 1990, the Alaska Supreme Court granted the state a stay in the McDowell decision until July 1, 1990.

April, 1990: Federal Government Moves to Assume Subsistence Management. On April 13, 1990, a Notice of Intent to propose regulations was published in the federal register. Temporary regulations establish a federal program that minimizes change to the state program, consistent with the federal government's ANILCA responsibilities. Temporary regulations were published on June 8, 1990.

May 1990: Legislature Debates Subsistence Options. Among options discussed by the legislature was a draft constitutional amendment submitted by Governor Cowper. After lengthy hearings in the final days of the session, the House amended the Governor's proposed amendment, then rejected it by a vote of 20-20 (27 votes needed). The amendment was never voted on by the Senate.

June 8, 1990: Governor Calls Special Session. Negotiations with several interest groups prior to the opening of the session failed to reach an agreement on a solution. On the opening day of the session, the Governor introduced a constitutional amendment that would have required, if approved by the voters at the next general election, a vote on the issue four years later. The amendment would have prevented federal management from occurring on July 1, and would have given groups time to either sue on the constitutionality of ANILCA Title VIII, or amend ANILCA. The governor's proposal was further amended by the Senate to require a vote in two years, and together with legislation creating a Subsistence Review Commission, passed the Senate in early July. However, on July 8, the House failed by one vote (26 in favor, 14 opposed) to obtain a 2/3 majority for a constitutional amendment.

June 1990: Cutler Decision on Severability. The Supreme Court remanded McDowell to the lower court for implementation of their order, and in an opinion dated June 20, with two subsequent clarifications, Judge Cutler found the unconstitutional portion of the state subsistence law to be severable from the rest of the law. This left the state with a subsistence priority law on the books, with its application to rural residents severed.

July 1, 1990: Federal Management Begins. The federal land management agencies initiate a program that assumed management of subsistence uses on federal public lands. This includes creation of a five-member federal subsistence board, representing the BLM, NPS, BIA, USFS, and USFWS.

July 1990: New Subsistence Hunts. The Alaska Board of Game held an emergency meeting to promulgate hunting regulations for the 1990 fall hunts. In anticipation of a larger pool of subsistence users (because all Alaskans were expected to be eligible to participate), nonresidents were excluded from many hunts, and other hunts were put on a Tier II, individual subsistence application, basis.

October 1990: All Alaskans Eligible. At a joint Boards of Fisheries and Game, on October 26, 1990, the Department of Law confirmed that, following the McDowell decision, all Alaskans must be considered potential subsistence users of the fish and game under state jurisdiction. The boards subsequently issued a policy statement that it was impossible, under the legal decisions, to identify subsistence users.

November 1990: New Subsistence Fisheries. The Board of Fisheries met and established new subsistence fisheries in both upper and lower Cook Inlet. A subsequent policy stated that subsistence fishing proposals, throughout the state, would be addressed only if subsistence needs were not being met, or if there was a conservation concern that was addressed by the proposal.

February 1991: Governor's Subsistence Advisory Council is Formed. Governor Hickel appointed an initial subsistence advisory group early in 1991 and reorganized it in November to add public members and remove the state commissioners; in all, the groups met for over a year. The ten-member group was charged with drafting a new subsistence statute that would comply with the state constitution.

1991-92: Federal Subsistence Program Develops. Publication in the Spring of 1992 of an EIS on the Federal Subsistence Program in Alaska clarified the federal government's intent with regard to managing subsistence on federal lands (mandated by ANILCA). The federal subsistence board established a staff and regular meeting schedule and began accepting public proposals. Other elements of the program included federal regional subsistence advisory councils, and a process for identifying rural areas and customary and traditional uses. The program applied to wildlife and to fishing in non-navigable federal waters.

February 1992: Governor Introduces New Subsistence Legislation. Governor Hickel introduced a bill to the legislature that would establish a new subsistence statute. A key feature of the bill, which was based on the work of the subsistence advisory council, was a presumption that residents of small communities would automatically meet specified subsistence criteria, in mid-sized communities that presumption was "rebuttable", and urban residents must apply for subsistence qualification on an individual basis. Also, nonsubsistence areas were authorized, and implementation would require amending ANILCA. The legislature failed to take action on the bill. Other bills also were considered during the session, but not passed, including an AFN- sponsored bill that provided a rural preference and also a second-level preference for urban residents who could demonstrate community or individual dependence.

June 15-22 1992: Governor Convenes Special Session on Subsistence: 1992 Subsistence Law is Enacted. Governor Hickel presented the legislature with a version of the bill that had been introduced in the previous session. Other bills also were introduced, as were motions to place a constitutional amendment on the ballot. The legislature ultimately passed a subsistence bill that provided eligibility for all Alaskans, detailed a stepwise process for implementing the subsistence preference, included a definition of "customary trade" and allowed the Boards to establish "nonsubsistence areas" in places where subsistence "is not part of the economy, culture, or way of life" of an area.

November 1992: Joint Boards of Fisheries and Game Establish Four Nonsubsistence Areas. Meeting jointly, the boards established nonsubsistence areas around Fairbanks, Anchorage-Matsu-Kenai, Juneau, and Ketchikan. These were areas where subsistence regulations would not be established. Subsistence regulations within these areas were repealed. They issued a call for proposals for other areas also. At a subsequent meeting the following March (1993), an area around Valdez also was designated as a nonsubsistence area. Later public proposals for additional areas, including GMU 13, all roaded areas, and an area on the Upper Holitna Drainage, were not adopted.

Fall 1993: State Superior Court Finds Nonsubsistence Areas to be Unconstitutional. Judge Fabe, in State Superior Court, found in Kenaitze v. State that the nonsubsistence areas authorized by the 1992 state law were unconstitutional because they "effectively re-establish the rural/urban residency requirement struck down in

McDowell" (Kenaitze Indian Tribe v. State of Alaska, 3AN-91-4560 Civil, Order, October 26, 1993). After the Alaska Supreme Court's subsequent denial of the state's motion for a stay, the Boards met in Spring 1994 and authorized the department to enact emergency regulations that would re-establish the previous subsistence regulations for the former nonsubsistence areas. The state also appealed the ruling to the State Supreme Court.

March 1994: U.S. District Court Validates Federal Subsistence Board Authority, Extends Federal Subsistence Management to Include Navigable Waters. Following preliminary rulings in Katie John, in late 1993, Judge Holland issued a final ruling that interpreted ANILCA as giving the federal government broad authority to manage subsistence on federal public lands, and extended jurisdiction to include navigable waters on federal lands. A parallel ruling in the case of State v. Babbitt found that creation of the federal subsistence regulatory board did not exceed the authority granted by ANILCA. These rulings were immediately appealed to the Ninth Circuit Court of Appeals by both the state and federal governments.

May 1994: Secretary of Interior Declares Intent to Manage Subsistence Fisheries Throughout the State. In a letter to the Governor that urged the state to act to come into compliance with ANILCA, Secretary Babbitt stated his intention to begin management of subsistence fisheries, "pursuant to the direction of the federal courts," if the state doesn't pass a constitutional amendment. The federal subsistence board was told to prepare a subsistence fisheries management plan.

January 1995: **State Drops Babbitt Lawsuit**. Governor Knowles directed the Attorney General to drop the state's appeal of the Babbitt case. In doing so he noted the case did not address the fundamental question of the constitutionality of ANILCA, some claims were time barred or not ripe for review, and other claims had been previously rejected. He further noted the state's continuance of the Katie John case.

April 1995: U.S. Ninth Circuit Court of Appeals Decides Katie John Case. The court of appeals held that ANILCA's subsistence priority applies to waters in which the United States has reserved water rights. The court further held that the federal agencies that administer the subsistence priority are responsible for identifying those waters. Federal agencies continued development of a fisheries plan and began a process for identifying waters where the plan would apply.

May 1995: Alaska Supreme Court Decides Nonsubsistence Areas Are Constitutional and the Tier II Proximity Criteria is Not. The Alaska Supreme Court, in the case of Kenaitze v. State, determined that "...the Tier II proximity of the domicile factor violates the Alaska Constitution because it bars Alaska residents from participating in certain subsistence activities based on where they live." Also, the court decided that the nonsubsistence area provision in the 1992 state subsistence law is constitutional because "...it bars no Alaskan from participating in any fish or game user class." With this ruling, the previously designated nonsubsistence areas were automatically reinstated. The Kenaitze's challenge to the findings of the Joint Boards that resulted in the establishment of the Anchorage-MatSu-Kenai Peninsula nonsubsistence area was remanded back to the Superior Court. Briefing on remaining issues should be completed by late April, 1996.

August 1995: Alaska Supreme Court Disagrees with Federal Court on the Scope of the Federal Subsistence Law. In the case of Totemoff v. State the Alaska Supreme Court made three significant findings: the federal subsistence law does not preempt nonconflicting state law; interpreted ANILCA as not protecting customary and traditional means and methods; and directly disagreed with the Ninth Circuit Court of Appeal's finding in State v. Babbitt (the Katie John case) that public lands include certain navigable waters. Because of the direct conflict with the federal court interpretation, the state filed a petition for review by the U.S. Supreme Court on December 5, 1995.

1995 - 1996: Governor Directs Lt. Governor to Begin "Quiet Diplomacy" Effort: In an effort to develop a consensus position on subsistence, Lt. Governor Fran Ulmer consulted with affected groups and produced a conceptual approach to resolving the subsistence impasse. This work addressed changes to the state constitution, state statutes, and federal law (ANILCA). This became the basis for subsequent Knowles administration positions.

April 1996: Federal "Advance Notice of Rulemkaing" in Navigable Waters with Reserved Water Rights. On April 4, 1996, the U.S. Departments of the Interior and Agriculture publicized an "advance notice of proposed rulemaking" in the federal register. They announced their intention to amend the scope and applicability of the federal subsistence program to include subsistence activities on inland navigable waters in which the U.S. has a

reserved water right. In addition, the rule amendments would authorize the federal subsistence board to restrict or eliminate hunting, fishing and trapping on state and private lands when the board determines that these activities interfere with their provision of the subsistence priority on public lands.

May 1996: U.S. Supreme Court Denies Petition to Review Katie John. After the Ninth Circuit Court issued its final opinion on the Katie John case in December 1995, the state petitioned the U.S. Supreme Court to review the decision. The U.S. Supreme Court denied the state's petition on May 13, 1996.

1997: Governor Knowles convenes 7-member subsistence task force. A task force recommendation released in January, 1998, was "an interdependent package of amendments to ANILCA, the Alaska constitution, and the Alaska statutes." The effective date of the ANILCA and statutory amendments would have been the date of passage of the constitutional amendment.

January 1998–October 1999: Sen. Stevens delays implementation of federal subsistence fisheries management. Senator Stevens negotiated a one-year moratorium on implementation of Katie John, in 1998, said that would be the last delay, then acquiesced in 1999 and extended until Oct 1, 1999, the effective date of federal management of fisheries. Sen. Stevens includes the task force ANILCA amendments in the FY 1998 appropriations bill, with a sunset provision if the legislature does not enact a constitutional amendment and state laws complying with ANILCA.

January 1998: Governor Knowles introduces subsistence legislation. Governor Knowles asks Legislature to pass a Constitutional amendment and statutory changes during the regular session. The legislature does not take any action.

January 1998: Legislative Council lawsuit. In January 1998, the Alaska Legislative Council and seventeen state legislators filed suit challenging title VIII and federal regulations for subsistence harvests. The district court dismissed the case in July 1998. On July 13, 1999, the Court of Appeals for the D.C. Circuit affirmed on other grounds, ruling the plaintiffs lacked standing to sue.

May 1998: Knowles calls Special Session on Subsistence. Following the regular legislative session during which subsistence was not addressed, the special session on subsistence results in failed votes on a resolution in both chambers (Senate: 13-7; House: 24-16).

July 1998: Knowles calls Special Session on Subsistence. Lawmakers fail to pass a constitutional amendment or other laws pertaining to subsistence management. Secretary Babbitt states federal agencies will publish regulations that assume management of subsistence fisheries on October 1, 1999.

January 1999: Knowles again introduces subsistence legislation. Again, the legislature fails to pass a constitutional amendment or subsistence law allowing the state to comply with ANILCA

September 1999: Governor Knowles again calls the legislature into Special Session to address subsistence. Governor Knowles asks Legislature to pass a Constitutional amendment. The House votes to place a constitutional amendment on the ballot (28 to 12) but the amendment fails in the Senate (12 to 8).

1999 – 2001: Expanding Federal subsistence program. In January 1999, the Secretaries issued a final rule implementing the Katie John decision. The rule became effective October 1, 1999. The final rule expanded the federal subsistence program to include all waters within the exterior boundaries of 34 identified federal areas, including waters passing through in-holdings within these areas, as well as inland waters adjacent to the exterior boundaries of the 34 areas. The federal subsistence management program expanded significantly with the assumption of fisheries responsibilities. Subsistence fishing regulations have diverged over this time, as in the cases where federal waters were closed to non-rural residents, by the federal board.

2000: Final District Court judgment in Katie John and State Appeal. After the Secretaries' final rule became effective, the Federal District Court for Alaska issued a final judgment, affirming its prior ruling on ANILCA's reach

to navigable waters. The State again appealed and asked for "en banc" consideration by the 9th Circuit Court of Appeals. In an "en banc" appeal, all eleven appellate judges, not just three, consider the case.

2001: Appellate Court decision in Katie John. A majority of the judges of the 9th Circuit Court of Appeals, sitting en banc, ruled that the court's earlier decision should not be changed. That decision holds that ANILCA gives the federal government the power to manage subsistence uses on navigable waters that are covered by the federal reserved water rights doctrine. Three appellate judges said that ANILCA should be interpreted to give the federal government power over all navigable waters, and three said that it should be interpreted to give it power over no navigable waters. The State asked for, and was granted, an extension until October 4, 2001, to file a petition for certiorari which would ask the United States Supreme Court to review the circuit court's decision.

1999 - 2001 and beyond: State/Federal work groups begin dual management coordination efforts. Federal and state fisheries and wildlife managers meet together under the terms of a draft Memorandum of Understanding that was initialed in 2000. Areas highlighted for coordinated actions include development of regulations, in-season management, research, special action requests, customary trade and barter, customary and traditional use determinations, and Advisory Committee/Regional Council activities.